

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

6 United States of America,) 3:09-CR-048-ECR-RAM
7 Plaintiff,)
8 vs.) **ORDER**
9 Nelson McKee,)
10 Defendant.)

At issue in this case is whether government counsel should be sanctioned for violating an Order of the Court.

I. Factual and Procedural Background

On April 13, 2010, defense witness Laurie Abel was arrested outside the courtroom after she provided testimony in the sexual assault case of Nelson McKee. Laurie Abel's arrest was in contravention of this Court's verbal Order:

The Order of the Court, Ms. Clerk, is that the United States Attorney shall not interfere with the presentation of the defense case through causing in any way the arrest of any witness who might come here based on any traffic offenses or the offenses which have been stated and presented to the Court here

We just can't have that type of threat or interference here. You can take care of that on some other occasion and should do so certainly -

The Court set a hearing for May 7, 2010, to determine whether sanctions should be imposed on the United States Attorney because of the arrest of the witness, Laurie Abel. (Case No. 3:09-CV-048, Minutes of Court at 3 (#116).) Both parties were given fifteen

1 days within which time to file points and authorities. On April
 2 28, 2010, both the government and defendant filed points and
 3 authorities (## 126 and 127).

4

5 **II. Analysis**6 **A. Sanctions**

7 Courts may use their inherent power to manage proceedings and
 8 control the conduct of litigants. Chambers v. NASCO, Inc., 501
 9 U.S. 32, 33 (1991). That power entails the ability to ensure
 10 obedience to their orders through sanctioning bad faith conduct
 11 that violates a court order. F.J. Hanshaw Enters., Inc. v. Emerald
 12 River Dev., Inc., 244 F.3d 1128, 1136 (9th Cir. 2001). Sanctions
 13 under the court's inherent power are reserved for those cases in
 14 which the offender's conduct "constituted, or was tantamount to,
 15 bad faith." Primus Auto. Fin. Serv., Inc. v. Batarse, 115 F.3d 644,
 16 648 (9th Cir. 1997). The concept of bad faith encompasses "a broad
 17 range of willful improper conduct," including conduct which is
 18 reckless "when combined with an additional factor such as . . . an
 19 improper purpose." Fink v. Gomez, 239 F.3d 989, 991-92, 994 (9th
 20 Cir. 2001); Gomez v. Vernon, 255 F.3d 1118, 1134 (9th Cir. 2001).

21 Similar principles that apply to criminal contempt proceedings
 22 apply to sanctions under the court's inherent power. Id. at 1137.
 23 "Criminal contempt is established when there is a clear and
 24 definite order of the court, the contemnor knows of the order, and
 25 the contemnor willfully disobeys the order." United States v.
 26 Rylander, 714 F.2d 996, 1001 (9th Cir. 1983). The penalty serves
 27 to vindicate the court's authority and, unlike civil contempt,
 28 does not terminate upon compliance with the court's order. Id.

1 Criminal contempt proceedings require various procedural
2 protections, such as the "beyond a reasonable doubt" burden of
3 proof. Id. at 998. Individuals subject to sanction "are afforded
4 procedural protections, the nature of which varies depending upon
5 the violation, and the type and magnitude of the sanction. The
6 more punitive the nature of the sanction, the greater the
7 protection to which an individual is entitled." F.J. Hanshaw
8 Enters., 244 F.3d at 1137. Sanctions that are punitive and
9 intended to vindicate the court's authority and the integrity of
10 the judicial process require the same due process protections that
11 would be available in a criminal contempt proceeding. F.J. Hanshaw
12 Enterprises, Inc., 244 F.3d at 1138-39. Thus, in this case,
13 government counsel is entitled to, inter alia, the "beyond a
14 reasonable doubt" burden of proof.

15 Government counsel's actions were certainly not within the
16 spirit of the Court's Order. This is particularly so in light of
17 the following admonition: "You can take care of [the arrest] on
18 some other occasion . . ." From the Court's viewpoint, this
19 statement indicates, at minimum, that arresting Laurie Abel before
20 the conclusion of the trial would be a violation of the Order.
21 Nevertheless, under a strained interpretation, the Court's Order
22 could be read to permit the arrest of Laurie Abel after she offered
23 testimony. The Court's admonition to arrest Laurie Abel on "some
24 other occasion" may not have been sufficiently clear to put
25 government counsel on notice that it would be inappropriate to
26 arrest Laurie Abel after her testimony was completed. The Court
27 further ordered that "the United States Attorney shall not
28 interfere with the presentation of the defense case through causing

1 in any way the arrest of any witness who might come here based on
2 any traffic offenses or the offenses which have been stated or
3 presented to the Court." It is conceivable that one could read
4 this to mean that the United States Attorney should not arrest any
5 witness in such a way as to interfere with the presentation of the
6 defense case. Under that interpretation, arresting Laurie Abel
7 after she offered testimony would not run afoul of the Court's
8 Order. Thus, government counsel's actions in this case, though
9 inappropriate, do not constitute bad faith, at least not beyond a
10 reasonable doubt. No sanction will be imposed.

11 B. The Court's Authority

12 Court have the inherent power to protect witnesses. Wheeler
13 v. United States, 640 F.2d 1116, 1123 (9th Cir. 1981) This power
14 stems from the "indisputably . . . broad powers (of the trial
15 judge) to ensure the orderly and expeditious progress of a trial."
16 Id. at 1123 quoting Bitter v. United States, 389 U.S. 15, 16
17 (1976). In the present case, we ordered that the government not
18 cause the arrest of a witness until after she returned home or, at
19 the very least, until after the conclusion of the trial. We have
20 discovered no binding precedent addressing the propriety of such an
21 order, nor exploring the separation of powers issue which would
22 inevitably animate such a determination. Ninth Circuit law,
23 however, suggests that our Order does not run afoul of the
24 Constitution or laws of the United States.

25 In Wheeler, the Ninth Circuit addressed a district court order
26 requiring the custodian of a federal prisoner to prevent the
27 prisoner from communicating with certain named witness. Id. at
28 1123. The court held that federal courts possess the inherent

1 power, "in certain unusual circumstances, [to] issue a post-trial
2 order to protect a witness." Id. The exercise of the court's
3 powers to protect a witness after the conclusion of the trial was
4 justified as promoting the more general purpose of protecting the
5 administration of justice from "abuses, oppression and injustice."
6 Id. "By protecting the witness after the trial, the court is
7 encouraging that witness, and other potential witnesses, to come
8 forward and provide information helpful to the implementation of
9 justice." Id.

10 It is notable that Wheeler court rejected "in full" the
11 petitioner's argument "that the court exceeded its authority
12 because it interfered with the executive branch's domain of prison
13 administration without a showing of a constitutional
14 violation . . ." Id. If a court can issue a post-trial order
15 protecting a witness, *a fortiori* can a court protect its witnesses
16 during trial.

17 The government contends nonetheless that the holding in United
18 States v. Santtini, 963 F.2d 585 (3d Cir. 1992), suggests we
19 exceeded our authority. In Santtini, defendants in a criminal
20 prosecution sought a deposition in Costa Rica of an alleged
21 unindicted coconspirator, who was a fugitive in Colombia. Id. at
22 587. Columbia, unlike Costa Rica, lacks an extradition treaty with
23 the United States. Id. at 592. The district court entered an
24 order precluding federal law enforcement agents from arresting the
25 subject if he came to Costa Rica to give the deposition. Id. at
26 587. The government appealed and alternatively sought
27 extraordinary writ. Id. The Third Circuit held that the district
28 court lacked the authority to order the government not to execute

1 the valid warrant, and concluded "that where a compelling
2 government interest exists, a court simply may not invoke its
3 'inherent' authority to ensure that all witnesses whose testimony
4 might exculpate the defendants testify at trial." Id. at 599. The
5 court found that the government indeed had a "compelling interest
6 in arresting [the unindicted co-conspirator] and prosecuting him
7 for his crimes as well as an institutional interest in maintaining
8 its power to arrest fugitives." Id. (internal quotation marks and
9 citation omitted).

10 Although Santtini is not binding precedent, we note that
11 Santtini is distinguishable from our case in several important
12 respects. First, in Santtini, the district court rejected the
13 government's offer to arrest the subject only after the deposition
14 had been concluded. Id. at 589. Instead, the district court's
15 order prevented the government from effecting the subject's arrest
16 "while he was in Costa Rica for the purpose of having his
17 deposition taken." Id. This effectively prevented the arrest of
18 the subject. The district court's order was thus far broader than
19 the Order at issue. The Order at issue in this case explicitly
20 advised government counsel that he could "take care of [the arrest]
21 on some other occasion, and should do so certainly." Nothing
22 prevented government counsel from causing Laurie Abel's arrest
23 after she returned home or after the trial was concluded. We did
24 not effectively preclude the government from arresting Laurie Abel.
25 Compared to the intrusion in Santtini, our intrusion on the
26 executive branch was slight.

27 Second, the warrant at issue in Santtini was indisputably a
28 valid arrest warrant. Id. at 592. This was not the case with the

1 warrant pursuant to which Laurie Abel was arrested. That warrant
 2 was issued in abstentia, without notice to Laurie Abel, and in
 3 violation of her due process rights. (Case No. 3:10-CV-221, Order
 4 at 6 (#9).) We subsequently quashed that warrant and granted
 5 Laurie Abel's Petition for Writ of Habeas Corpus. (Id. at 7.)

6 Third, the governmental interest in Santtini was more
 7 compelling than the governmental interest in this case. The events
 8 leading up to the issuance of Laurie Abel's arrest warrant and
 9 arrest are worthy of mention:

10 Petitioner was sued civilly in tribal court for
 11 failure to pay her electric bill. The amount at issue
 12 was \$536.26. Petitioner was served a copy of the
 13 summons and complaint on October 19, 2004, but failed
 14 to answer. The tribal court held a hearing on January
 15 21, 2005. Petitioner was served with a notice of
 16 hearing regarding the January 21, 2005, hearing, but
 17 she did not appear. On March 10, 2005, the tribal
 18 court issued a "Notice of Intent to Enter Default" and
 19 a separate "Order to Appear and Show Cause." The order
 20 to show cause noted that Petitioner had called the
 21 clerk of the tribal court and explained that she could
 22 not attend the January 21, 2005, hearing because of a
 23 doctor's appointment in Boise. The tribal court
 24 required proof of the doctor's appointment, and
 25 threatened to hold Petitioner in contempt if she failed
 26 to produce evidence of the appointment. Despite its
 27 title, the "Order to Appear and Show Cause" order to
 28 show cause did not set a hearing, or any other specific
 date, at which Petitioner was to "appear"; apparently,
 the tribal court contemplated that Petitioner would
 simply contact the clerk of the tribal court and submit
 such proof.

Petitioner did not, however, respond to either the notice of intent to enter default or the order to show cause. There is nothing in our record that indicates when or if she was even served with those orders of the tribal court.

On November 17, 2005, the tribal court entered default judgment against Petitioner in the civil action. On August 2, 2006, the tribal court issued a contempt order, sentencing Petitioner in absentia to five days of detention for "Contempt pursuant to Ordinance 2003-SPO-09, section 4.50.015, (a)(3 & 4)." On the same date, August 2, 2006, the tribal court issued the "Warrant to Apprehend," pursuant to which Abel was arrested on April 13, 2010.

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2 (Id. at 2.) The government certainly has, in general, a compelling
3 interest in causing the arrest of persons, pursuant to valid
4 warrants. Even if the warrant at issue in this case were valid,
5 however, the government's interest would still be less compelling
6 than the interest at issue in Santtini. There was no governmental
7 interest at play here remotely as compelling as the institutional
8 interest in maintaining power to arrest fugitives. Santtini, 963
9 F.2d at 599.

10 C. Lawfulness of the Order as a Defense to Sanctions

11 The government raises the unlawfulness of our Order as a
12 defense to sanctions. This defense is meritless. Even if our
13 Order was unlawful, the government cannot raise the unlawfulness of
14 the Order as a defense to sanctions. See In re Establishment
15 Inspection of Hern Iron Works, Inc., 881 F.2d 722, 726 (9th Cir.
16 1989) ("The contemnor cannot ordinarily raise the invalidity of the
17 judicial order as a defense to a contempt charge.") Our system of
18 law is premised on the "simple fact that orders, once issued, must
19 be respected. If litigants were able to disobey the duly ordered
20 judgments of the courts at will, the integrity of the judicial
21 system-as well as the effectiveness of the administrative search
22 system constructed by Congress-would be substantially undermined."
23 Id. at 730.

24
25 III. Conclusion

26 Government counsel's actions in this case, though not within
27 the spirit of our Order, do not constitute bad faith, at least not
28 beyond a reasonable doubt. Our Order was within our authority.

1 Courts have the inherent authority to ensure the orderly and
2 expeditious progress of a trial and to protect witnesses. Our
3 intrusion on to the executive branch was slight and did not offend
4 the principle of separation of powers. Regardless, the
5 unlawfulness of our Order would not be a meritorious defense to
6 sanctions.

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8 **IT IS, THEREFORE, HEREBY ORDERED** that government counsel will
9 not be sanctioned for the arrest of Laurie Abel on April 13, 2010.

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11 **IT IS FURTHER ORDERED** that the hearing, set for Friday May 7,
12 2010, is vacated.

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15 || DATED: May 6, 2010.

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Edward C. Reed.

UNITED STATES DISTRICT JUDGE